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NO. 99-62

In The
SUPREME COURT OF THE UNITED STATES

SANTA FE INDEPENDENT SCHOOL DISTRICT,

Petitioner,

v.

JANE DOE, Individually and as next of friend for her minor children, Jane and John Doe, et al.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF *AMICI CURIAE* FOR STEPHANIE VEGA AND OTHER STUDENTS AND PARENTS OF SANTA FE INDEPENDENT SCHOOL DISTRICT IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

1. With regard to a student who is selected by fellow students through a fair and secular process devoid of government influence, to speak at a high school event, with control of content vested solely in the individual student, does the First Amendment require the government to censor and/or prevent and/or punish the student for religious utterances when secular speech is allowed; or do the Free Exercise and Free Speech Clauses require the government to permit student religious speech at the same time, and in the same place and manner, as it permits secular speech?

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INTEREST OF *AMICI CURIAE*[1]

Amici include Stephanie Vega and 71 other students and parents in the Santa Fe Independent School District (hereinafter "SFISD").[2] Stephanie Vega was elected by her classmates in

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[1] The parties have consented to the filing of this brief and their consents are submitted herewith. Kelly Coghlan authored the brief in its entirety. No person or entity made a monetary contribution to the preparation or submission of this brief other than counsel for *Amici* and SFISD students and parents who are *Amici* herein. Coghlan is not working for, or on behalf of, any church, religious organization, association, political party, or "special interest" group.

[2] *Amici* include: Maria Vega, individually and as next friend for her minor child Stephanie Vega (10th grade); Jessica Veasey, individually (12th grade); Julie and Tim Finley, individually and as next friends for their minor children Kristin Finley (10th grade) and Laurin Finley (5th grade); Robert and Lynda Janice, individually and as next friends for their minor children Nick Quesada (8th grade) and Jonathon Quesada (5th grade); Bruce and June Ousley, individually and as next friends for their minor children Shannon Ousley (8th grade) and Bryan Ousley (7th grade); Bruce and Julie Terry, individually and as next friends for their minor children Bruce Terry III (11th grade) and Blaine Terry (6th grade); Larry and Karen Griswold, individually and as next friends for their minor children Jana Griswold (12th grade) and Asron Griswold (10th grade); Darrell and Gina Kearley, individually and as next friends for their minor child Baily Chafin (10th grade); Vick and Connie Carrell, individually and as next friends for their minor child Brad Carrell (8th grade); Gerald and Donna Pruitt, individually and as next friends for their minor children Julie Pruitt (11th grade) and Janice Pruitt (9th grade); Lori Whyde, individually and as next friend of her minor child Sarah Whyde (8th grade); Bill and Karen Pennington, individually and as next friends for their minor child Cort Pennington (9th grade); Lylia Patterson, individually and as next friend of her minor children Rick Patterson (11th grade), Ginny Patterson (9th grade), and Gregory Patterson (5th grade); Rick and Karen Vaughn, individually and as next friends for their minor children Daniel Vaughn (9th grade) and Steven Vaughn (5th grade); Susan Wollam individually and as next friend for her minor child Ashley Wollam (9th grade); Kimberly Marsh, individually (12th grade); Audrey Flowers, individually (12th grade); Krystal Benskin, individually (12th grade); Kevin Sawyer, individually (12th grade); Jeremy Ottinger, individually (12th grade); Michael Christian, individually (12th

May, 1999, to deliver a "brief invocation and/or message" (or "statement") before the football games for the upcoming 1999/2000 school year.

Under the Fifth Circuit's decision, Stephanie Vega will be allowed to say virtually anything to formalize the beginning of the SFISD football games for the 1999/2000 school year except a prayer or other religious utterance. Stephanie Vega does not understand why the government has seemingly become so vehemently anti-God, anti-religion, and anti-prayer, and why the State is forcing viewpoint discrimination upon her. The Fifth Circuit has sent a powerful message--that the government disapproves of *Amici* and that *Amici* are outsiders.[3]

Kelly Coghlan was hired by *Amici* to seek governmental neutrality regarding student choice and implementation of a "brief invocation and/or message" (or "statement") at football games and an "invocation and benediction" at graduation services--without judicial censorship, scripting, coaching, or viewpoint discrimination.

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grade); Brett and Leta Ford, individually and as next friends for their minor child Mindy Ford (10th grade); Melinda Hicks, individually and as next friend for her minor child Candace Hicks (10th grade); Don Carroll, individually and as next friend for his minor children Dawn Carroll (12th grade) and Dana Carroll (12th grade); Cindi Brown, individually and as next friend for her minor child Bridgit Brown (12th grade); Jamie Rogers, individually and as next friend for her minor children Jimbo Butler (8th grade) and Ashley Rogers (7th grade); Mettra Poutry, individually and as next friend for her minor child Kim Poutry (10th grade); Aaron Gibson, individually (12th grade); and Jimmy Mayberry, individually and as next friend for his minor child Jimmy Mayberry (10th grade). The grade levels reflect the grades completed in the public schools of SFISD.

[3] If endorsement of religion is unconstitutional because it "sends a message to nonadherents that they are outsiders," disapproval is unconstitutional because it "sends the opposite message." Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

INTRODUCTION AND SUMMARY OF ARGUMENT

The civil liberties of 46,280,000[4] students attending public schools in America are at risk as a result of the Fifth Circuit panel's split-decision in the present case. Shortly after the decision, school districts began requiring students to submit their proposed graduation solemnizations to school officials for editing, to assure viewpoint conformity.[5] Within weeks of the case, another federal circuit was already citing the Fifth Circuit as supporting authority for placing harsh restrictions on the religious liberties of students under its own jurisdiction. See Adler v. Duval County Sch. Bd., 174 F.3d 1236, *vacated*, Nos. 98-2709, 98-2720, 1999 WL 354889 (11th Cir. June 3, 1999, *pending en banc*). The chilling effect caused by the subject case is incalculable, not only affecting students in Texas, Louisiana, and Mississippi, but, potentially, students in public schools across America.

In 1962, state/local legislative branches of government were prescribing and proscribing when, where, and what students

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[4] "Nation-wide more than 52 million children are enrolled in school, from kindergarten through the twelfth grade; 89 percent go to public schools, 11 percent to private schools". NBC Nightly News: NBC News In Depth (NBC television broadcast, Feb. 10, 1999). And the number of secondary school-age students is on the rise: "The U.S. Census Department says the American teen population is on a growth spurt. From 31 million last year to an estimated 50 million by the year 2010." Dateline NBC (NBC television broadcast, July 7, 1999).

[5] Appendix A is the text of high school student Katherine Hackleman's graduation solemnization reflecting the portions unilaterally excised by school officials as unacceptable viewpoint. Hackleman was required to pre-submit her solemnization and disallowed to say those portions marked through by school officials.

Appendix B is the cover page of the Complaint filed in Hackleman v. Aledo Indep. Sch. Dist., No. 499-CV-0416-Y (D. Tex. filed May 20, 1999).

could pray.[6] In 1999, with the advent of the Fifth Circuit's decision, it is now the federal judicial branch prescribing and proscribing when, where, and what students can pray.[7] It is important to *Amici* and the more than 46 million other students attending public schools in America that this Court correct the Fifth Circuit's misinterpretation of the First Amendment.

ARGUMENT AND AUTHORITIES

I. "Message"/"Invocation"/"Benediction"/"Statement" Policies Of SFISD Are Constitutional As Written

The facts do not present a prayer case but rather a student "utterance" case. "Prayer" is not mentioned, much less required or encouraged, under either of the SFISD policies. See Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 812 (5th Cir. 1999). The Fifth Circuit's references to SFISD's policies as "prayer policies" is a misnomer. SFISD's football policy speaks of a "brief invocation and/or message" (or "statement"[8]) to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition;" and the graduation policy speaks of an "invocation and benediction." The definitions[9] of "invocation"

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[6] Engle v. Vitale, 370 U.S. 421 (1962).

[7] Exerting control over the content of students' prayers in one instance and entirely proscribing students' prayers in another.

[8] The Fifth Circuit's opinion reproduces only a portion of the entire football policy. See Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 812 (5th Cir. 1999). The football policy's second and fifth paragraphs, not reproduced in the opinion, use the additional word "statement" to describe the unfettered breadth of student choice over content. See full text of SFISD's football policy in Petition for Writ of Certiorari, app. F.

[9] Webster's Third New International Dictionary (3d ed., Merriam Webster Inc. 1993) at 1190, 203, 1418 & 2229. There is no evidence that SFISD intended variant meanings outside of the definitions. Also see Jones v.

("the action or an act of petitioning for help or support"), "benediction" ("an expression or utterance of blessing or good wishes"), "message," and "statement" have no required prayer or religious component.[10]

Under the SFISD policies,[11] a prayer might never be uttered (*a fortiori*, from year to year, students may decide to have no student solemnizations at all). The terms "invocation," "benediction," "message," and "statement" are so broadly defined in the dictionary as to include virtually any viewpoint, utterance, or communication. Unlike Ingebretson v. Jackson Pub. Sch. Dist., 88 F.3d 274 (5th Cir.), *cert. denied*, 519 U.S. 965 (1996), nowhere do the SFISD policies allow school officials to "decide who prays and which prayers qualify" (Id. at 278), "inform students...that they can pray" (Id. at 279), "review the content of prayers" (Id.), or "determin[e] who gets to say the prayer at each event" (Id.); nor do the SFISD policies allow prayers to be given by "teachers, school administrators, and clergy at school functions" (Id.). Under the SFISD

Clear Creek Indep. Sch. Dist., 977 F.2d 963, 969 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993) ("Clear Creek II") ("But the Resolution permits invocations free of all religious content...."). As much as the Fifth Circuit would like to include the word "prayer" or "religion" into SFISD's policies, the definitions of the words in the policies do not support such inclusion.

[10] "Welcome. We ask everyone to do their part in helping to assure a safe game by observing good sportsmanship, both on the field and in the stands. May we be blessed with good weather and no injuries. Good luck to both teams." These remarks meet all four definitions of the terms used in the SFISD policies, yet have no religious component.

[11] Both polices in issue were enacted by the 1995 SFISD School Board. The district court found that "SFISD had abandoned any [previous] potentially problematic policies." See 168 F.3d at 813. There is no evidence implicating the 1995 SFISD School Board of any unconstitutional motivations in passing the two 1995 policies in issue (indeed, the policies were passed pursuant to district court orders and under the district court's watchful eye--See 168 F.3d at 811-812).

policies, students singularly decide whether to have any student solemnizations for the year, which students will give the solemnizations,[12] and the content of solemnizations. SFISD has no part in making any of these decisions.[13]

The Fifth Circuit is factually incorrect in its' assertion that "school officials [of SFISD] are present and have the authority to stop the prayers." 168 F.3d at 823. The text of the policies do not support this contention; there is no evidence in the record to support this position; and, *a fortiori*, the district court's order of May, 1995 makes it clear that such is not the case: "SFISD should play no role in selecting the students or scrutinizing and approving the content of the invocations and benedictions." 168 F.3d at 811. "Once the class of elected student speakers is chosen, SFISD maintains no power, discretionary or otherwise, to bar any duly chosen speaker from accomplishing his task." Id. at 831 (Jolly, J., dissenting).[14]

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[12] Contrary to the Fifth Circuit's implication of exclusivity, (see 168 F.3d at 820), the pool of potential speakers under the graduation policy includes every senior; and under the football policy, every student. Under both policies, any and all students in the respective pools are eligible to volunteer to be selected by students. See Petition For Writ of Certiorari, apps. F, G (SFISD's graduation policy and football policy).

[13] Both policies facially provide neutral accommodation of student decisions regarding solemnizations which students choose without endorsement, coercion, or entanglement by the district (the content of which the school board neither scripts, supervises, endorses, suggests, or edits).

[14] Thus, if SFISD stopped a solemnization based on viewpoint discrimination, students would, no doubt, have legal recourse against SFISD for violating the district court's orders, breaching its own SFISD written policies, and violating students' constitutional rights. SFISD has never interrupted or stopped a students' remarks (prayer or otherwise) under either policy.

II. Solemnization As Historically Practiced In America Does Not Support Fifth Circuit's Rationale

The Fifth Circuit's rationale for mandating viewpoint discrimination at football games is that such games are "hardly the sober type of annual event that can be appropriately solemnized with prayer." 168 F.3d at 823.

Webster's Third New International Dictionary (3d ed., Merriam Webster Inc. 1993) at 2168, defines "solemnize" as: "1: to hold, conduct, observe, or honor with due formal ceremony or solemn notice." The definition has no restricted applicability to only events which themselves are "a sober type of annual event" or "singularly serious" or "nurturing," as the Fifth Circuit so narrowly confines the meaning of the term. 168 F.3d at 823.

Eating a meal would not fit within the Fifth Circuit's definition of an event that "can be appropriately solemnized with prayer," and yet, millions pray daily to solemnize the routine occasion of eating. Thousands of Rotary Clubs and similar organizations assemble weekly to eat and meet, and yet these secular organizations solemnize these common, non-ceremonial events with vocal prayer. Rodeos and other secular sporting events routinely open with vocal prayer. Congress solemnizes every session with vocal prayer, not merely its special ceremonial occasions.[15] Each day a federal court is in session is not necessarily a "singularly serious" day of solemn ceremony (nor an "annual event"), yet a law clerk opens with a vocal solemnization that ends with the prayer, "God, save the United States and this Honorable Court."[16]

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[15] Marsh v.Chambers, 463 U.S. 783, 786 (1983).

[16] Lee v. Weisman, 505 U.S. 577, 635 (1992) (Scalia, J., dissenting); County of Allegheny v. ACLU, 492 U.S. 573, 630 (1989); Lynch v. Donnelly, 465 U.S. 668, 693 (1984) (O'Connor, J. concurring); Zorach v.

Why should courts restrict students' solemnizations that mention "God" to only once-in-a-lifetime events, when federal courts do not restrict their own use of daily vocal solemnizations (containing a prayer comprised of two supplications to "God") to the same standard.[17]

Throughout America's history, prayer has been used to solemnize activities ranging from the mundane to the sublime--including high school football games. When we are interpreting the Constitution, "a page of history is worth a volume of logic." New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (Justice Holmes).

III. Secular Purposes of Solemnization In Schools Support Constitutionality Of SFISD's Policies

In public schools, there are student activities having natural beginnings and ending--such as graduations and football games. Just prior to the beginning of these activities, there is usually noise, walking around, talking and such. Attaining attention, silence, and focus normally entails some act to mark the beginning of the occasion. In America, solemnization has traditionally been utilized for this purpose. Methods of solemnization vary, but all generally provide a moment conducive to reflection, focusing, and calming.[18]

Clauson, 343 U.S. 306, 313 (1952).

[17] *A fortiori*, citizens required to be present before federal courts are "captive audiences" to the solemnizations; and these are government sponsored solemnizations.

[18] While ceremonial prayer is one method of solemnization, it certainly is not the only method. A moment of silence, reading a quote, singing the National Anthem, reciting the Pledge of Allegiance, offering words of welcome, and various other methods have been used as techniques of solemnization, and are all available for use by students as "invocations," "benedictions," "messages," and/or "statements" under SFISD's graduation and football policies. A targeted elimination of one method of

Justice O'Connor has written that "acknowledgements" such as, *inter alia*, "prayers...serve in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society."[19]

It is axiomatic that in the absence of students there would be no football games or graduations. These events exist primarily for the students, not primarily for school officials or judges. There is therefore no compelling reason for school officials or judges to be involved in conducting or scripting solemnizations of student activities when students are desirous and capable of doing this themselves. Permitting students choice concerning the issue of brief solemnizations of some of their own student activities does not put the government in a position of endorsing anything other than student choice.

There are educational benefits to allowing students the opportunity of deciding for themselves how, when, if, and by whom, they wish to solemnize, formalize, and dignify some of their own school activities. Placing this responsibility on high school students provides educational opportunities in, *inter alia*, speech, civics, government, and constitutional law.[20]

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solemnization on the basis of religious content is not in keeping with "a course of 'neutrality' toward religion" (quote from Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 792-93 (1973)).

[19] Lynch, 465 U.S. at 692-693 (O'Connor, J., concurring). Implicit in this statement, is that ceremonial solemnization is not intended to, nor does it, have the primary effect of attracting new converts or advancing religion. The undersigned has been unable to document a single historical instance of revival breaking out as a result of a short ceremonial prayer at a high school football game or graduation ceremony.

[20] Students who are selected by students to conduct the solemnizations must author, prepare, practice, and deliver a short public address, thereby providing educational opportunities in speech and presentation. Exposure

There are as many secular reasons supporting the appropriateness of solemnizing football games (with prayer as an available option) as there are supporting solemnizing graduations (with prayer as an available option); albeit different reasons. High school football games regularly involve long standing rivalries between schools and towns. These games present great potential for conflict, disagreement, dissension, danger, and violence between opposing fans.[21]

A moment of quiet solemn expression (traditionally a prayer) has historically gone far to soothe turbulent atmospheres at high school football games.[22] This is an

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to diverse student solemnizations can be educational for those listening, also promoting tolerance of other's ideas and expressions. The voting and implementation process provides all students with learning opportunities in civics, government, and constitutional law. These are all educational subjects worthy of hands-on learning in high school. Rather than merely learning about these subjects academically, the process involves the students in the operation, exercise, and practice of the subjects.

[21] Who among us has not witnessed (in person or via media) some form of verbal or physical acts of aggression or violence between fans of opposing teams at sporting events--especially at high school football games.

[22] In Longview, Texas, during the 1970/71 school year (when the all black Womack High School was merged, under federal court order, with Longview High School) the undersigned was a senior. It was a time of tension, fear, fights, and violence. The bloodiest and most widespread fighting of the year occurred on a Friday afternoon before a high school football game. Although school officials broke up the near riot, there were injuries, and the rumor was that the racial violence would continue at the football game that night and that blacks and whites were organizing for the confrontation. Before the beginning of the game, the tension was palpable. When it was time to start the opening formalities, the President of the Student Council began a prayer over the public address system (specifically addressing the black/white issues--how all are equal, how love of each other must prevail, asking for peace and blessings on all, and seeking God's intervention). The mood changed, tension melted, and there was a calm which continued throughout the game with no fights or confrontations.

Is there less of a need today for student solemnization (with prayer

important tradition which has, throughout the years, fostered calm, reflection, good behavior, and safer games.

IV. Students' Religious Expression, As Opposed To Governments' Religious Expression, Is Protected Speech

The Fifth Circuit fails to adequately distinguish between government speech and private speech. While government sponsored prayer in public schools is unconstitutional,[23] the Court has never prohibited genuinely student initiated prayer in public schools. The sole focus of the Religion Clauses of the First Amendment is on what "Congress" (all levels of government) cannot do; not on what private citizens (students) cannot do. The "wall of separation between church and state" is not a wall between religious and non-religious students but is a wall between the government and all students.[24] The

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included as an option) than in 1970? Have the schools of 1999 become so much calmer and safer than the schools of 1970: Pearl, Mississippi, October 1, 1997, two dead, seven wounded; West Paducah, Kentucky, December 1, 1998, three dead, five wounded; Jonesborough, Arkansas, March, 1998, five dead, ten wounded; Springfield, Oregon, May, 1998, four dead, twenty-one wounded; Richmond, Virginia, May, 1998, two wounded. Dateline NBC: Gunfire At Armstrong High (NBC television broadcast, Sept. 25, 1998). Littleton, Colorado, April 20, 1999, fifteen dead, twenty-three wounded; Conyers, Georgia, May 20, 1999, six wounded.

Barry Mano, President of the National Association of Sports Officials, states, "We are getting more reports than ever in the history of the organization with regard to referees being assaulted." 20/20 (ABC television broadcast, May 30, 1999).

More, not fewer, solemnization opportunities are needed in public schools to foster an atmosphere of calm, focus, and composure, with the goal of producing safer sports events and safer schools.

[23] Engle, 370 U.S. 421.

[24] As long as members of the government (including the judiciary) do not "jump over the wall" and attempt to influence students' religious expressions (either instigating or stifling) the "wall" is not breached.

Constitution prevents governments' pro-religious acts (Establishment Clause), but protects students' pro-religious acts (Free Exercise and Free Speech Clauses). As stated in Board of Educ. of Westside Community Schools v. Mergens, 496 U.S. 226, 250 (1990):

> [T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support [religious] student speech that it merely permits on a non-discriminatory basis.

In Chandler v. James, Nos. 97-6898, 97-6953, 1999 U.S. App. Lexis 15608, at 4-5 (11th Cir. July 13, 1999), the court generally adopts the school district's position:

> First, students are not state actors and, therefore, by definition, their actions cannot tend to "establish" religion in violation of the Establishment Clause. Second, the Free Speech and Free Exercise Clauses of the First Amendment require the State to *tolerate* genuinely student-initiated religious speech in schools.

If student speech incidentally advances religion in some sense, this does not violate the Establishment Clause since student speech is, by definition, private speech: "[T]o have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." Corporation of Presiding Bishop of

the Church of Jesus Christ v. Amos, 483 U.S. 327, 337 (1987); also see Mergens, 496 U.S. at 250.

However, if a school district requires, that student speech be religious, this is what violates the Establishment Clause.[25] "It is not the 'permitting' of religious speech which dooms their policies, but rather the *requirement* that the speech be religious...." Chandler, 1999 U.S. App. Lexis 15608, at 5. Merely permitting students to verbalize religious ideas signifies neither State approval nor disapproval of the speech but only the State's acknowledgment of its' constitutional duty to tolerate religious expression.[26] Only in this way is true

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[25] For instance, school officials delegating surrogates to do what the school officials themselves may not do directly--such as selecting clergy or students for the specific purpose and express task of praying at school events (Lee, 505 U.S. at 577; Karen B. Treen, 653 F.2d 897 (5th Cir. 1981)); or, permitting private parties to speak but then limiting the speech to a prayer or other religious speech (Ingebretsen, 88 F.3d at 277; Hall v. Board of Sch. Comm'rs, 656 F.2d 999 (5th Cir. 1981); Collins v. Chandler Unified Sch. Dist., 644 F.2d 759, 760-61 (9th Cir. 1981)).

[26] Government acquiescence to brief use of school public address systems for students to solemnize (which might never include prayer) is de minimis state action and the slightest act of neutral accommodation by the government.

But, the Fifth Circuit contends: "Prayers that a school 'merely' permits will still be delivered to a government-organized audience, by means of government-owned appliances and equipment, on government-controlled property, at a government-sponsored event, thereby clearly raising Establishment Clause concerns." 168 F.3d at 817. However, if this were the test, Lee would have been a short opinion indeed (since all of these same factors existed in the Lee graduation); and Clear Creek II and Chandler and all of the Supreme Court's "neutral accommodation" cases would be wrong. Denying students the use of government-owned equipment on the basis of viewpoint discrimination is antithetical to "neutral accommodation." The First Amendment does not require the "government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." Zorach, 343 U.S. at 314. Also see Mergens, 496 U.S. at 250 ("a school does not endorse or

neutrality observed. SFISD does not require, either directly or indirectly, that student speech be religious. If a solemnization is religious, it is only because a student has independently decided that it be so.

The last time the Supreme Court directly addressed the subject of school prayer was in Lee v. Weisman, 505 U.S. 557 (1992).[27] A close reading of Lee reveals that SFISD's policies are constitutional. In Lee, the Court invites non-government

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support [religious] student speech that it merely permits on a non-discriminatory basis"); also see e.g., Chabad-Lubavitch of Georgia v. Miller, 5 F.3d 1383, 1391-1392 (11th Cir. 1992) (*en banc*) ("the failure to censor is not synonymous with endorsement").

Government's tolerance of disbelief does not require atheism to be elevated over belief. The First Amendment requires only that the State tolerate both, while establishing neither. Students, however, are free to prefer one or the other and to express that preference whenever they are permitted to speak. "What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion." Lynch, 465 U.S. at 692 (O'Connor, J., concurring) (emphasis added).

[27] In Lee, a principal unilaterally decided to have prayer at graduation; selected the person to pray; selected a clergyman; and directed the clergyman to pray according to guidelines provided by the principal. In a five to four decision, the Court came within one vote of holding that even this degree of government involvement was constitutional. In Lee, not only was the vote close, but the holding was narrow. Although the Lee Court had the opportunity to hold that any and all prayer at public school events would violate the Constitution, the Court did not do so, but rather held that only the particular circumstances of that case were unconstitutional, stating: "These dominant facts mark and control the confines of our decision....Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one....Our jurisprudence in this area is of necessity one of line drawing." Lee, 505 U.S. at 586, 597, 598 (emphasis added); also see Lynch, 465 U.S. at 678 ("In each case, the inquiry calls for line-drawing...."). Slightly different facts can be outcome determinative in First Amendment cases: See Lynch, 465 U.S. at 681-82; compare with Allegheny, 492 U.S. at 598-600. Also see Clear Creek II, 977 F.2d at 965 & n.4.

persons (obviously, in the context of the school prayer case, referring to students) to undertake the "task" of formulating "prayers":

> If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself.
>
> The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State.

Id. at 588 (emphasis added).

This language strongly suggests that schools permit the student body "to undertake that [prayer] task for itself."[28]

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[28] Although the Court gives no guidance as to which students should "undertake the task," a school-wide decision involving all students would seem to be the most equitable. This allows districts to be outcome-neutral and communicates to students and to the community that the district is not endorsing, coercing, or entangling itself with the decision, selection of student(s), or content of solemnizations.

When it is widely known, as in SFISD, that the presence and content of student solemnizations are of student choice, the issue of perceived government endorsement is dispelled as "the endorsement test necessarily focuses upon the perception of a reasonable, informed observer" rather than that of "the casual passerby." Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 773 & 779-780 (1995) (O'Connor, J., concurring). But, even a casual passerby should draw no more of a conclusion of government endorsement of religion if a student should say a prayer then

Regarding such efforts by students, the Court directs that "the First Amendment does not allow the government to stifle prayers which aspire to these ends." Id. **If students are never allowed by the schools or courts to attempt the "task," then these words in Lee are meaningless.** Student initiated solemnization is a step toward what Lee suggests, and SFISD was simply following these Lee directives.

The above quote from Lee is in accord with other Supreme Court decisions which collectively lend further support to the constitutionality of SFISD's student solemnization policies.[29]

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the same passerby should draw a conclusion of government hostility toward religion if a student should say no prayer.

[29] (1) "It can hardly be argued that...students...shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 506 (1969).

(2) Government may not favor one speaker over another based on substantive content. Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys...[or] favor one speaker over another. Discrimination against speech because of its message is presumed unconstitutional....Viewpoint discrimination is thus an egregious form of content discrimination"). Government may not discriminate based on viewpoint in even a non-public forum. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983); Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 806 (1985); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

(3) Governmental accommodation of religion is constitutionally mandated: "Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." Lynch, 465 U.S. at 673 (emphasis added); also see Widmar v. Vincent, 454 U.S. 263, 273-74 (1981); Nyquist, 413 U.S. at 792-93; Zorach, 343 U.S. at 312-315.

(4) Ceremonial prayer serves the valid secular purpose of solemnization. Alleghany, 492 U.S. at 595-596 n.46; Id. at 630 (O'Connor, J., concurring); Lynch, 465 U.S. at 693 (O'Connor, J., concurring); see also e.g., Engel, 370 U.S. at 435 n.21.

And, a number of federal appellate panels have followed the Lee pronouncements.[30]

A judicial dictate of "no student prayer at football games" is just as wrong as a judicial dictate requiring student prayer at football games--both are extremes of the same wrong and equally non-neutral. A judicially prescribed "equal silence for all" is not neutral as such rule singularly prefers and advances the "atheists' religion of silence." "That would be preferring those who believe in no religion over those who do believe." Zorach, 343 U.S. at 314. "Cleansing" our public schools of religious expression inevitably results in the "establishment" of disbelief--atheism--as the States' religion. As President William Clinton said, while speaking on the topic of religious liberties in public schools:

> The First Amendment, I will say it again, does not convert our schools into religion-free zones....[and] does not require students to leave

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[30] (1) Clear Creek II, 977 F.2d 963--recognizes the critical difference between government-initiated and student-initiated prayer: "[A] majority of students can do what the State acting on its own cannot do to incorporate prayer in public high school graduation ceremonies." Id. at 972.

(2) Doe v. Madison Sch. Dist., 147 F.3d 832 (9th Cir. 1998), *vacated as moot*, No. 97-35642, 1999 WL 317050 (9th Cir. May 19, 1999)--holds constitutional a policy in which the four top academically-ranked graduates were invited to deliver "an address, poem, reading, song, musical presentation, prayer, or any other pronouncement" at graduation. Id. at 834.

(3) Chandler, 1999 U.S. App. Lexis 15608--holds invalid a district court's injunction that prohibited a school district "from permitting [student] vocal prayer or other devotional speech in its schools...such as aloud in the classroom, over the public address system, or as part of the program at school-related assemblies and sporting events, or at a graduation ceremony." Id. at 3. The district court "may neither prohibit genuinely student-initiated religious speech, nor apply restrictions on the time, place, and manner of that speech which exceed those placed on students' secular speech." Id. at 13.

> their religion at the schoolhouse door.... It protects freedom of religion by allowing students to pray, and it protects freedom of religion by preventing schools from telling them how and when and what to pray.[31]

V. Judicial Censorship And Scripting Of Students' Religious Expressions Violates Students' Consciences, Amounts To Viewpoint Discrimination, And Creates A Preferred State Religion

Permitting only "non sectarian/non proselytizing" prayers creates a preferred creed and official "civic" religion of the court's invention[32] (permitting students to "speak only the religious thoughts that government want[s]...[students] to speak and to pray only to the God that government wants [students] to pray to"[33]).[34] The courts must then police and monitor the new judicially created sect to assure adherence to its strict dogma and to punish aberrant utterances.[35] For the government to dictate that a student cannot pray a prayer

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[31] President William J. Clinton, James Madison High School, Vienna, Virginia, in Office of the Press Secretary (The White House, July 12, 1995).

[32] "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion...." West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (emphasis added).

[33] Engel, 370 U.S. at 435.

[34] The Fifth Circuit's idea, however, is not original, even to this century. The religion of worshiping at the altar "To An Unknown God" dates back thousands of years to Athens, Greece. See *Acts* 17:22-23 (The history of Paul's travels in Athens).

[35] Mergens, 496 U.S. at 253 ("[A] denial of equal access to religious speech might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech...."); also see Widmar, 454 U.S. at 272 n.11 (1981); Madison, 147 F.3d at 838.

containing the words of his/her own choice[36] will not only cause the student to violate his/her conscience, but, as to at least one religion, will cause the student to violate a basic tenet of his/her faith.[37]

The idea of a person being "offended" by the expression of another's prayer may simply be a euphemism for intolerance.[38] Silencing prayer is not the answer; tolerance is the answer. And if tolerance can be learned, practiced, and promoted as a result of student solemnization, students will finish their high school years better prepared for life.

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[36] The Fifth Circuit's requirement that students' prayers at graduations be "nonsectarian and non-proselytizing" is little different than the principal's requirement of clergy in Lee. The Lee Court found that by advising the speaker to deliver "nonsectarian" prayers, the principal "directed and controlled the content of the prayers." Lee, 505 U.S. at 588. Also see Ingebretson, 88 F.3d at 279 (School officials' involvement in determining which prayers are "nonsectarian and non-proselytizing...excessively entangles government with religion").

[37] The phrase, "in Jesus' name" is not a tag line added to proselytize or offend. When Christians use this phrase, they are obeying a basic tenet of their faith. *John* 16:24, 26, 27; also see *John* 14:13-14, 15:16; *Colossians* 3:17.

[38] "In this country, it seems to me that we are ruled by the tyranny of the sensitive." Bill Moyer, Politically Incorrect (ABC television broadcast, June 16, 1999).

If a student elects to say a prayer as his/her choice of "message," "invocation," "benediction," or "statement," any person not agreeing with the student's selection is not compelled to stand, bow their head, close their eyes, or otherwise participate. This is similar to the situation regarding Jehovah's Witnesses who believe that it is morally and religiously wrong for them or anyone else to say the Pledge of Allegiance--although the Pledge (which contains the assertion that we are "one nation under God") is routinely said in public schools over public address systems to "captive audiences" of children belonging to this religion. Those not believing in the Pledge are not required to stand, salute, listen, or otherwise participate; but we continue saying the Pledge. See Barnette, 319 U.S. 624.

VI. CONCLUSION

Amici Curiae respectfully request the Court grant SFISD's Petition for Writ of Certiorari and thereafter reverse the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Attorney For *Amici Curiae*
Students and Parents Of Santa
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Dated: August 4, 1999

APPENDIX

APPENDIX A

~~Heavenly~~ God ~~Father~~ we come before you today to thank ~~You~~ for bringing us to this great occasion. Thank you for leading, guiding and protecting each and every one of us. ~~Thank you for having a plan to prosper us and not to harm us. Lord as we open this ceremony we recognize before you our sins and ask you to forgive us.~~ As Our life now opens before us and we must now accept responsibility for our decisions. ~~Help us to lean on you for direction and follow in your footsteps.~~ Thank you for your love ~~from you.~~ Help the class of 1999 to move in ~~the world~~ in strength and love for others. ~~Let us take on the likeness of you and~~ set an example for the world to follow. Thank you for your love and thank you for your guidance and protection each and every moment. ~~We love you.~~

[redacted]

Amen

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 499-CV-0416-Y

KATHERINE HACKLEMAN,

Plaintiff,

vs.

ALEDO INDEPENDENT SCHOOL DISTRICT,

Defendant.

PLAINTIFF'S ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

KATHERINE HACKLEMAN, individually, hereinafter referred to as "Plaintiff," complains of **THE ALEDO INDEPENDENT SCHOOL DISTRICT,** hereinafter referred to as "Defendant," and say:

I.

THE PARTIES

A. The Plaintiffs

1.1 KATHERINE HACKLEMAN is an individual over 18 years of age residing in Weatherford, Texas, and is a student who is graduating from high school in the Aledo Independent School District.

1.2 At all material times herein, **KATHERINE HACKLEMAN** was a student properly enrolled in high school within the Aledo Independent School District which is operated by the Aledo Independent School District in Aledo, Texas.

B. The Defendant

1.3 THE ALEDO INDEPENDENT SCHOOL DISTRICT (hereinafter referred to as "AISD" or the "District") is an independent school district authorized by and constituting a . . .

* * * *